United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

Affidavit

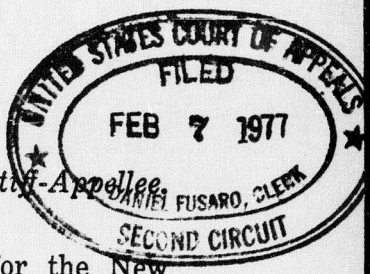
76-6182

To be argued by
ROBERT S. GROBAN, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6182



STEFANOS ZAOUTIS,

Plaintiff-Appellee,

—v.—

MAURICE KILEY, as District Director for the New York District of the Immigration and Naturalization Service, and IMMIGRATION AND NATURALIZATION SERVICE,

Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLANTS

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Issues Presented

1. Was the Board's interpretation of the statute of limitations in Section 246(a) of the Immigration and Nationality Act consistent with that provision's historical antecedents and entitled to great deference from the District Court?

2. Did Zaoutis' conduct throughout his rescission proceeding preclude him from asserting the statute of limitations?

Relevant Statute

Immigration and Nationality Act, § 246(a), 66 Stat. 163 (1952), *as amended*, 8 U.S.C. § 1256

> (a) . . . If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 345 or 249 of this Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling deportation in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made.

Relevant Regulations

Title 8, Code of Federal Regulations [CFR]:

§ 246.1 *Notice*—If it appears to a district director that a person residing in his district was not in fact eligible for the adjustment of status made in his case, a proceeding shall be commenced by the service upon such person of a notice of intention to rescind which shall inform him of the allegations upon which it is intended to rescind the adjustment of his status. . . .

§ 246.3 *Allegations contested or denied; hearing requested.*—If, within the prescribed time following service of the notice pursuant to § 246.1, the respondent has filed an answer which contests or denies any allegation in the notice, or a hearing is requested, a hearing pursuant to § 246.5 shall be conducted by a special inquiry officer and the procedures specified in §§ 242.10, 242.11, 244.12, 242.13, 242.14(c), (d), and (e), and 242.15 of this chapter shall apply.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6182

STEFANOS ZAOUTIS,

Plaintiff-Appellee.

—v.—

MAURICE KILEY, as District Director for the New York District of the Immigration and Naturalization Service, and IMMIGRATION AND NATURALIZATION SERVICE,

Defendants-Appellants,

BRIEF OF DEFENDANTS-APPELLANTS

Preliminary Statement

This action was commenced on June 10, 1975. The complaint contained nine separate causes of action but essentially sought a declaratory judgment that the decisions of the Immigration Judge and Board of Immigration Appeals, which ordered plaintiff-appellee Stefanos Zaoutis' ("Zaoutis") status as a permanent resident rescinded pursuant to Section 246(a) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1256(a), were time barred by the five year statute of limitations contained in Section 246(a) of the Act (A. 3-15).* Subse-

* Page citations preceded by the letter "A" refer to the Joint Appendix filed with this Court.

quently issue was joined (A. 131-36) and, on June 21, 1976, Zaoutis moved for summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure contending that no genuine issue of fact existed and that he was entitled to judgment as a matter of law (A. 18). On July 26, 1976 the defendants-appellants cross-moved for summary judgment also contending that they were entitled to judgment as a matter of law (A. 137).

On August 6, 1976 a hearing was held before the Honorable Inzer B. Wyatt, United States District Court Judge for the Southern District of New York, with respect to the issues raised by the parties' respective motions for summary judgment (A. 244). Thereafter, on August 11, 1976, Judge Wyatt filed an opinion which granted Zaoutis' motion for summary judgment (A. 237-43). On September 13, 1976 Judge Wyatt filed an order, embodying his decision, which granted Zaoutis judgment against defendants-appellants and ordered that the order of rescission entered against Zaoutis by defendant Immigration and Naturalization Service ("Service") be declared "null and void" (A. 244-45). The defendants-appellants filed their notice of appeal from the District Court's opinion and order on November 12, 1976 (A. 246).

It is defendants-appellants' position that the decision of the District Court should be reversed because: (1) it erred in failing to hold that the issuance of a notice to rescind by the district director tolled the statute of limitations contained in Section 246(a) of the Act; and (2) even if it was correct in finding that the statute of limitations had not been tolled, the District Court erred

in failing to find that Zaoutis' conduct precluded him from asserting the statute of limitations.

Statement of the Case

A. Introduction.

The plaintiff-appellee Stephanos Zaoutis is a twenty-seven year old alien who is a native and citizen of Greece (A. 3, 20). On November 6, 1963 Zaoutis was admitted to the United States as a non-immigrant employee of the Greek Consulate in New York, where he was to live and to work as a doorman (A. 3, 20, 47).[1]

On January 10, 1965 Zaoutis, who spoke only Greek and understood little English (A. 35), was introduced to Fredeswinda Camacho, a United States citizen who spoke only Spanish and understood little English (A. 70), by Angelo Collazo (A. 66, 72).[2] Later that day Zaoutis participated in a marriage ceremony with Ms. Camacho who, after the ceremony, went to a lawyer's office to

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[1] See Sections 101(a)(15)(G)(V) and 214 of the Act, 8 U.S.C. §§ 1101(a)(15)(G)(V) and 1184.

[2] At this time Mr. Collazo worked for a New York attorney as a counsellor on marriages (A. 65). His duties included locating American citizen girls who were willing to go through marriage ceremonies with aliens for money and then to petition the Service to accord their "husbands" immediate relative status on the basis of their "marriages". (*See* Section 201(b) of the Act, 8 U.S.C. § 1151(b)) (Id.). As "immediate relatives" of United States citizens, these aliens could be admitted to permanent residence in the United States without regard to the quota limitations of the Act (*see* Section 202 of the Act, 8 U.S.C. § 1152) and thus were easily able to "adjust their status" from nonimmigrants to aliens admitted to permanent residence under Section 245 of the Act, 8 U.S.C. § 1255.

execute a petition to classify Zaoutis as her immediate relative for immigration purposes (A. 73, 161-62).[3] Subsequently, Ms. Camacho's I-130 petition was submitted to the Service and, on May 14, 1965, was approved (A. 4, 22).[4] Thereafter Zaoutis submitted an application to the defendant-appellant Maurice Kiley ("district director") to adjust his nonimmigrant status to that of an alien lawfully admitted to permanent residence pursuant to Section 245 of the Act, 8 U.S.C. § 1255.[5] On August 25, 1965 the district director approved Zaoutis' application for adjustment of status based on his marriage to a United States citizen and admitted him to permanent residence in this country (A. 5, 31).[6]

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[3] An I-130 petition. *See* 8 C.F.R. § 204.1.

[4] The complaint in this action contends that Ms. Camacho's I-130 petition was approved on May 14, 1965 while the affidavit of Zaoutis' counsel asserts that this petition was approved on May 10, 1965. Since the exact date is not relevant to this appeal we shall adopt the former as correct.

[5] *See* 8 C.F.R. § 245.2.

[6] In his complaint (A. 4) and in the affidavit supporting his motion for summary judgment (A. 20), Zaoutis attempted to infer some color of validity to his marriage to Ms. Camacho by asserting that this marriage was not necessary to his lawful admission to this country since he also would have been eligible for an immigrant visa based on his relationship to his brother, a United States citizen, and on Section 203(a)(5) of the Act, 8 U.S.C. § 1153(a)(5). This contention is without merit because, despite his eligibility for a visa under Section 203(a)(5), it would have been impossible for Zaoutis to obtain such a visa during this time (A. 140-41).

Aliens attempting to immigrate to the United States pursuant to Section 203(a)(5) are subject to the numerical limitations placed on immigration by Sections 202 and 203 of the Act, 8 U.S.C. §§ 1152 and 1153. From 1963 through 1965 only 308 visas were available to all prospective Greek immigrants (A. 140). However, these visas were utilized by nonquota Greek immigrants as well as those Greeks eligible for visas under the first three preferences. Thus, during this period, fourth prefer-

[Footnote continued on following page]

Just two years and three months after participating in the marriage ceremony with Fredeswinda Camacho, Zaoutis apparently traveled to Mexico where he was granted an *ex parte* divorce from Ms. Camacho on April 5, 1967 (A. 141, 154, 165).[7] A short time later Zaoutis returned to Greece and married Helene Gaglia, a childhood acquaintance, on October 1, 1967 (A. 30, 141). Subsequently, Zaoutis filed another I-130 petition with the Service to accord his new wife a preference under the Act[8] and enable her to gain lawful admission to this country based on his status as a permanent resident. This petition has not been approved due to the discovery of the manner in which Zaoutis acquired his permanent residence status (A. 30).[9]

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ence visas (those based upon sibling relationships to United States citizens) were unavailable to eligible Greek visa applicants because the quota was oversubscribed (Id.). As a result the only way in which Zaoutis could have obtained the immigrant visa which was the condition precedent to adjustment of his status (*See* Section 245(a)(2) of the Act, 8 U.S.C. § 1255(a)(2)) was as an immediate relative eligible for nonquota status under Section 201(b) of the Act, 8 U.S.C. § 1151(b) (A. 140-41).

[7] Section 241(c)(1) of the Act, 8 U.S.C. § 1251(c)(1), establishes a statutory presumption of fraud in marriages which are judicially terminated less than two years after they have been utilized to accord immigration benefits to one of the spouses. This provision was inapplicable to Zaoutis' marriage because he waited until the two year period expired before obtaining his Mexican divorce. But *see* Section 241(c)(2), 8 U.S.C. § 1251(c)(2).

[8] *See* Section 203(a)(2) of the Act, 8 U.S.C. § 1153(a)(2).

[9] Currently Zaoutis' second wife and the couples' three children continue to live and reside in Greece and Zaoutis has apparently spent a considerable amount of time there with them since his second marriage in 1967 (A. 171). *Cf. Matsumura* v. *Higgins*, 187 F. 601 (9th Cir. 1911).

B. Attorney General's delegate delays instituting rescission proceedings against Zaoutis.

Shortly after Zaoutis and Ms. Camacho participated in their marriage ceremony, the Service discovered that a large number of other marriages between United States citizens and Greek aliens had been arranged solely to accord immigration benefits to the aliens (A. 141). As a result, the Service initiated an investigation to determine not only how many other marriages had been similarly arranged but, more importantly, the identities of the third party organizers and arrangers of these marriages and whether evidence existed to indict and convict them (Id.).[10] Necessarily the investigation proceeded at a deliberate pace so that pending and potential indictments would not be jeopardized (Id.). Moreover, since the targets of this inquiry had to be key witnesses in any future immigration proceedings to rescind prior Service action based on the fraudulent marriages, those immigration proceedings had to be held in abeyance pending a determination by the Courts as to the guilt or innocence of the arrangers because of the obvious Fifth Amendment problems involved.[11]

A portion of the Service's investigation focused on Angelo Collazo and the New York lawyer who employed him to arrange the sham marriages Greek aliens used to obtain immigration benefits (A. 142). From information provided by this lawyer, Zaoutis' marriage surfaced as one of a number arranged by Angelo Collazo to circumvent the immigration laws (Id.). However, pending disposition of the charges against Angelo Collazo, no

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[10] Individuals who conspire to defraud the United States or who knowingly and willfully falsify material facts to agencies of the United States are subject to prosecution under 18 U.S.C. §§ 371, 1001-02 respectively.

[11] *Id.*

action could be taken by the Service against any of the alien participants to these marriages.[12]

C. The Attorney General's delegate is satisfied that rescission proceedings are warranted against Zaoutis.

On February 18, 1969 Angelo Collazo pleaded guilty to two counts of conspiring to defraud the United States by arranging sham marriages to circumvent its immigration laws.[13] The Service immediately requested Fredeswinda Camacho to appear at its district office in New York on March 25, 1969 to be interviewed with respect to the bona fide nature of her marriage to Zaoutis (A. 142).

Ms. Camacho appeared at the Service's office as requested. During her interview she asserted that her marriage to Zaoutis was bona fide and she refused to admit that it had been contracted solely to circumvent the immigration laws (A. 153). However, based on the evidence in the Service's possession, the Service was convinced that Zaoutis' marriage was a sham (A. 156). Accordingly, it sought to enlist the cooperation of other witnesses to prove this allegation (A. 142-43).

In February, 1970 the Services obtained the cooperation of Angelo Collazo and, mindful of the statute of limitations contained in Section 246(a) of the Act, 8 U.S.C. § 1256(a) (A. 156), quickly moved to confront Ms. Camacho with Collazo's testimony in an effort to force her to recant her statement of March 25, 1969 (A. 143). Thus, Mr. Collazo and Ms. Camacho were requested to appear at the Service's district office in New York on February 24, 1970 to make further statements with respect to Ms. Camacho's marriage to Zaoutis (*Id.*).

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[12] *Id.*

[13] *See United States* v. *Angel Luis Callazo*, 68 Cr. 984 (S.D. N.Y. 1969).

Ms. Camacho appeared as requested, accompanied by her attorney. In his presence and with the aid of a Spanish interpreter she gave a Service investigator a complete sworn statement regarding the circumstances surrounding her marriage to Zaoutis in 1965 (A. 143, 157-67). In summary, Ms. Camacho stated under oath that:

1. her marriage to Zaoutis had been arranged by Angelo Collazo (A. 158);

2. she had only agreed to participate in the marriage ceremony with Zaoutis in return for money (A. 158-159);

3. she had never met Zaoutis prior to the date on which the marriage ceremony was held (A. 160);

4. following the marriage ceremony she, Angelo Collazo and Zaoutis went to a New York lawyer's office where she executed a prepared I-130 petition on Zaoutis' behalf (A. 162);

5. after the I-130 petition was signed she was taken to an apartment at 226 Central Avenue in Brooklyn and told that she could live there rent-free if she retained Zaoutis' name on the mail box, kept some of his clothes in her closet, and told the Service a prepared story concerning how they met and married (A. 163-64);

6. Zaoutis only stayed in this apartment for one night during the year and a half she lived there (at a time when the Service was investigating the marriage) and that during this night they slept in separate rooms (A. 164-65); and

7. she was never in love with Zaoutis and did not cohabit with him (A. 165).

Based on the information obtained by the Service during its investigations, the evidence resulting from the cooperation of the third party subjects of that investigation, and the February 24, 1970 sworn statement of Fredeswinda Camacho, the district director was satisfied that, because of his sham marriage to Ms. Camacho, Zaoutis had been ineligible for adjustment of status in August, 1965. Accordingly, on May 20, 1970 he issued a notice of intention to rescind Zaoutis' adjustment of status (A. 31-32).[14]

D. Zaoutis attempts to establish a more favorable immigration record.

Once the district director commenced rescission proceedings against Zaoutis, Zaoutis was required to respond to the allegations in the notice or to request a hearing with respect to those allegations.[15] If he had failed to do either within thirty days,[16] his immigration status as a permanent resident would have been revoked automatically and would have reverted to the status he en-

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[14] Section 246(a) of the Act, 8 U.S.C. § 1256(a), authorizes the Attorney General to rescind the action granting an alien adjustment of status if, within five years after the date of that action, he is satisfied that the alien was not eligible for adjustment of status at the time it was initially granted. The notice issued by the district director against Zaoutis on May 20, 1970 was issued pursuant to Section 103(a) of the Act, 8 U.S.C. § 1103(a), and 8 C.F.R. § 246.1 which authorize the district director to take this action in place of the Attorney General if it appears to the district director's satisfaction that it is warranted.

[15] *See* 8 C.F.R. §§ 246.2, 246.3.

[16] *See* 8 C.F.R. §§ 246.1, 246.2.

joyed immediately preceding his August 25, 1965 adjustment of status.[17]

On June 10, 1970 Zaoutis elected not to respond to the allegations in the notice but to request a hearing in this matter. Accordingly, on June 11, 1970, his attorney forwarded a letter to the Service requesting such a hearing but asking that it not be held between June 29, 1970 and July 27, 1970 since he would be out of the United States during his period (A. 33).[18]

During this time the Service also received a request from the Discipline Committee of the Association of the

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[17] In his legal memorandum supporting his motion for summary judgment in the District Court, Zaoutis inferred that the immediate consequence of the Court's refusal to void the order of recission in his case would be his deportation to Greece where, incidentally, his second wife and three children continue to reside (A. 103-05). This inference is unwarranted. The order of rescission entered pursuant to Section 246(a) of the Act, 8 U.S.C. § 1256(a), and the applicable regulations (*see* 8 C.F.R. § 246), merely rescinds from Zaoutis the grant of adjustment of status which he had procured improperly and restores to him that immigration status which he enjoyed prior to August 25, 1965. Of course, this does not preclude the institution of deportation proceedings against Zaoutis if he cannot justify his status. But in the event such proceedings are commenced, Zaoutis will be given a full deportation hearing pursuant to 8 C.F.R. § 242 at which he can apply for discretionary relief based on any equities he had accumulated from his stay in this country. *See Matter of S*, 9 I & NS Dec., 548, 554 (1962).

[18] At several instances in the proceedings before the District Court, Zaoutis claimed that this request demanded that a hearing be held immediately to determine the sufficiency of the allegations contained in the district director's notice (A. 7, 24, 97-8). This claim is not supported by the language of the letter in question (A. 33). At no point in that letter was such a demand made. The letter was sent to the Service solely to comply with the administrative requirements contained in 8 C.F.R. § 246 and to notify the Service what dates would be inconvenient for such a hearing.

Bar of the City of New York in which the Service was asked to arrange for Zaoutis to testify against the New York lawyer responsible for his marriage to Fredeswinda Camacho (A. 38, 69). As a result, the Service suspended the rescission proceedings to relay the Discipline Committee's request to Zaoutis' attorney to enable him to review with Zaoutis the ramifications of compliance with that request.[19]

Shortly thereafter, protracted negotiations ensued between the Service and Zaoutis' attorney in an effort to obtain Zaoutis' cooperation in the Discipline Committee's investigation and his testimony at the hearing against the lawyer (A. 38). Finally, despite Zaoutis' cooperation (A. 169), it was determined that his testimony was not necessary to the Discipline Committee's case against the lawyer and Zaoutis' rescission hearing was rescheduled (A. 38-9). At no point from May 20, 1970, the date on which the district director's notice was issued, until June 2, 1971, the date on which Zaoutis' rescission

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[19] In addition to the possibility that his cooperation might postpone the conclusion of his rescission hearing such that an Immigration Judge, the Board of Immigration Appeals, or a federal court on review, might conclude it was barred by Section 246(a) of the Act, 8 U.S.C. § 1256(a), *see Quintana* v. *Holland*, 255 F.2d 161 (3rd Cir. 1958), another substantial reason existed for Zaoutis to agree to testify for the Discipline Committee. As discussed above (*see* footnote 17, *supra*), if the rescisson proceedings resulted in the entry of an order of rescission against Zaoutis, he would then be subject to deportation proceedings based on his immigration status prior to August 25, 1965. At such proceedings Zaoutis would probably wish to apply for some form of discretionary relief requiring a showing of good moral character (e.g., voluntary departure, suspension of deportation, etc.). Accordingly, Zaoutis' cooperation in this instance might help to establish favorable equities in his immigration record to counterbalance the fraud he perpetrated on the Service in his marriage to Fredeswinda Camacho. It would also give Zaoutis additional time within which to establish these equities.

hearing began, did Zaoutis or his attorney request the Service to resume rescission proceedings immediately because Zaoutis was being prejudiced by the delay.

E. Zaoutis attempts to bar rescission proceedings based on the District Court's decision in *Singh* v. *Immigration and Naturalization Service*.

Zaoutis' rescission hearing was commenced before Immigration Judge Joseph J. Mack on June 2, 1971. Initially Judge Mack asked both sides if they were ready to proceed and both responded that they were (A. 36). However, before any testimony could be taken, Zaoutis' attorney requested that the hearing be terminated because: (1) it now was barred by the five year statute of limitations contained in Section 246(a) of the Act, 8 U.S.C. § 1256(a), as interpreted in *Singh* v. *Immigration and Naturalization Service*, 313 F. Supp. 532 (N.D. Calif. 1970) (A. 36-7); and (2) the Service's failure to initiate the hearing while Zaoutis was cooperating with the Discipline Committee should estop the Service from proceeding with it at this time (A. 38-9).[20]

In response to this motion to dismiss the proceeding, Judge Mack reserved decision on its first aspect, the

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[20] In his complaint (A. 7) and legal memorandum supporting his motion for summary judgment (A. 98) in the District Court, Zaoutis claimed that, in addition to these two grounds of dismissal, his attorney had requested the Immigration Judge to terminate the proceedings because of a lack of due process in that "the information relating to [Zaoutis'] case had been induced within the year prior to the hearing by a fraudulent representation that [Zaoutis] would not be prosecuted. . . ." (Id.) There is no testimony in Zaoutis' rescission hearing to support this claim. Moreover, even if it had been asserted in a timely manner, the record is clear that no such representation was ever made to Zaoutis (A. 169).

statute of limitations and the *Singh* case (A. 38), but refused to consider its other aspect until some evidence was introduced on which a finding of estoppel against the Service could be inferred (A. 40-1). Judge Mack specifically permitted Zaoutis' counsel to renew the motion if such evidence was introduced (Id.).[21]

After considering Zaoutis' motion to dismiss, Judge Mack sought to begin the hearing and requested the Service to present its case (A. 38). However, Zaoutis' counsel objected to the commencement of the hearing until his motion to dismiss (on the basis of the statute of limitations) had been decided (A. 41). Reluctantly the Service acquiesced in this objection, subject to a time limitation, and the Immigration Judge agreed to adjourn the hearing without date to enable the parties to prepare and submit briefs (A. 41-4). Subsequently the Immigration Judge further adjourned the hearing pending the Ninth Circuit Court of Appeals consideration of the Service's appeal from *Singh* v. *Immigration and Naturalization Service, supra* (A. 46, 180).[22]

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[21] No evidence was introduced in Zaoutis' rescission proceeding to support a finding of estoppel and this motion was never renewed before the Immigration Judge. *See Tok* v. *I.N.S.*, — F.2d — (2d Cir. 1976); Cf. *Geisser* v. *United States*, 513 F.2d 862 (5th Cir. 1975).

[22] In *Singh*, the District Court had reversed a Board of Immigration Appeals decision in *Matter of Singh*, 13 I & N S Dec. 439 (1969), which had concluded that the statute of limitations set forth in Section 246(a) of the Act, 8 U.S.C. § 1256(a), was tolled by the issuance of a notice of intention to rescind pursuant to 8 C.F.R. § 246.1 and that, as a result, the rescission proceeding did not have to be completed within five years. The Service appealed this decision immediately.

F. The evidence clearly shows that Zaoutis' marriage was a sham arranged solely to obtain immigration benefits.

On February 24, 1972 the Ninth Circuit Court of Appeals reversed the District Court's decision and reinstated the Board of Immigration Appeals' decision in *Matter of Singh*.[23] Thereupon, Immigration Judge Mack reconvened Zaoutis' rescission hearing on April 10, 1972 and dismissed his motion based on the District Court's decision in that case (A. 46). Judge Mack then asked both sides if they were ready to proceed and, when both responded affirmatively, requested the Service to call its first witness (A. 45-6).

The Service called Zaoutis as its first witness. Although Zaoutis claimed that his marrige to Fredeswinda Camacho had been legitimate (A. 8, 99), in response to questioning by the Service's trial attorney, Zaoutis was unable to recall the date of his marriage (A. 51), the year in which his marriage occurred (A. 51, 56), the number of times he had dated Ms. Camacho prior to their marriage (A. 51), or the address at which Ms. Camacho lived prior to their marriage (A. 54).

At the conclusion of Zaoutis' direct testimony, his attorney declined to cross-examine him and requested that he be allowed to present his entire case, including Zaoutis' testimony in his behalf, at one time in a subsequent portion of the hearing (A. 61-2). Since the Service's next witness, Angelo Collazo, lived outside the district and arrangements had to be made in advance to procure his attendance, the parties agreed to adjourn the hearing until June 22, 1972 (A. 62). On June 9, 1972, Zaoutis'

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[23] 456 F.2d 1092 (9th Cir.), *cert. denied*, 409 U.S. 847 (1972).

attorney wrote the Service and requested an additional adjournment on humanitarian grounds to permit Zaoutis to remain in Greece with his wife and new-born third child (A. 171). Consequently, the hearing was continued until October 2, 1972 (A. 63).

Prior to the commencement of the hearing on October 2, 1972, Zaoutis' attorney became ill and was unable to participate in the hearing (A. 64). However in recognition of the elaborate arrangements which the Service had made to procure the attendance of witnesses, he agreed to permit the Service to examine its witnesses in his absence (A. 64).[24] Accordingly the hearing proceeded and the Service called Angelo Collazo as its second witness (A. 64).

In summary, Angelo Collazo testified that:

1. he had been employed by a New York attorney as a marriage counselor and that his duties included locating American citizen girls willing to marry aliens who could then use these marriages to adjust their status in the United States (A. 65);

2. he had found Fredeswinda Camacho and had convinced her to marry an alien for money, a rent-free apartment and a promise of a quick divorce once the alien's immigration status was adjusted (A. 66-8);

3. he and Fredeswinda had met Zaoutis for the first time on January 10, 1965, the date of Zaoutis' marriage (*Id.*); and

4. after the marriage ceremony he had taken Zaoutis and Fredeswinda to the lawyer's office

[24] No objection has been made by Zaoutis concerning this procedure and his attorney was furnished with transcripts of the testimony prior to the next hearing (A. 77).

where she executed several immigration papers and was paid (A. 69).

After Angelo Collazo was excused the Service called its third witness, Fredeswinda Camacho (A. 70). In substance, she reiterated the testimony she gave to the Service in her sworn statement dated February 24, 1970 (A. 157-67) and corroborated the salient portions of the testimony given by Angelo Collazo (A. 70-5). At the conclusion of her testimony, the Immigration Judge adjourned the hearing to enable Zaoutis' attorney to present his case at one hearing (A. 75).

The final session of Zaoutis' rescission hearing was convened on February 7, 1973 (A. 77). At this time, notwithstanding his earlier request to be allowed to present Zaoutis' case at one time in one hearing (A. 61), Zaoutis' attorney announced he had "nothing further to present. . . ." (A. 78). Accordingly the Immigration Judge reserved decision and closed the hearing (Id.).

On October 15, 1973 the Immigration Judge issued his written decision (A. 79-85). Initially the Judge reiterated his denial of Zaoutis' motion to dismiss, based on the statute of limitations.[25] Then the Judge re-

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[25] In his complaint (A. 8) and legal memorandum in support of his motion for summary judgment (A. 100) in the District Court, Zaoutis criticized the Immigration Judge's failure to address himself to those aspects of Zaoutis' motion to dismiss allegedly based on a lack of due process, laches and fraud. However, as discussed above (*see* footnotes 20 and 21, *supra*) the estoppel aspects of Zaoutis' motion were dismissed by the Immigration Judge at the June 2, 1971 hearing without prejudice to their being renewed at a subsequent hearing when some evidence was introduced to support them (A. 40-1). Since Zaoutis chose to present no evidence and failed to renew this aspect of his motion, his objections to the Immigration Judge's decision in this respect are untenable.

viewed the testimony of Zaoutis, Angelo Collazo and Fredeswinda Camacho the three witnesses who appeared at the hearings. He found the testimony of the latter two, who asserted that Zaoutis' marriage was a sham, entered into solely for immigration benefits, "totally credible" (A. 84). He found the testimony of Zaoutis, "totally incredible" (Id.). Consequently, the Judge concluded that the Service had

> ". . . established by clear, convincing and unequivocal evidence of record that (Zaoutis) was ineligible for adjustment of immigrant status on August 25, 1965 on the ground that his marriage on January 10, 1965 to Fredeswinda Camacho was a sham marriage entered into with no intent to be a valid and subsisting marriage and was entered into solely for the purpose of enabling (Zaoutis) to adjust his immigrant status in the United States and circumvent the immigration laws of the United States" (A. 84-5).

On October 23, 1973 Zaoutis filed his notice of appeal from Immigration Judge Mack's decision with the Board of Immigration Appeals ("Board") (A. 175). In that notice Zaoutis asserted only two grounds for error namely, that the Immigration Judge had erred in failing to terminate the proceeding pursuant to the statute of limitation contained in Section 246(a) of the Act, 8 U.S.C. § 1256(a), and that the Judge's decision was not supported by clear, convincing and unequivocal evidence (Id.).[26]

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[26] In his complaint, Zaoutis asserts that he also appealed to the Board on the issues of whether he was denied due process, whether the Service erred in failing to proceed promptly with his rescission proceeding, and whether the delay in the proceeding was unjustified and prejudicial to him (A. 9). Again, an examination of the notice of appeal will not support this assertion (A. 175).

After hearing oral argument (A. 176-84), the Board dismissed Zaoutis' appeal on May 2, 1974 for two reasons (A. 86-7). Initially, based on the Ninth Circuit Court of Appeals' decision in *Singh* v. *Immigration and Naturalization Service*, *supra*, the Board concluded that the statute of limitations contained in Section 246(a) of the Act, 8 U.S.C. § 1256(a), did not bar the rescission action against Zaoutis (A. 87). However, the Board also addressed Zaoutis' estoppel argument and rejected it noting that Zaoutis had failed to introduce any evidence that he had been prejudiced by the delay in the proceedings (Id.).[27] Subsequently, on June 10, 1975 Zaoutis instituted this action.

ARGUMENT

POINT I

The Board's Interpretation Of The Statute Of Limitations In Section 246(a) Was A Reasonable Interpretation, Consistent With That Provision's Historical Antecedents And Entitled To Great Deference From The District Court.

In its opinion granting Zaoutis' motion for summary judgment, the District Court acknowledged that to apply the statute of limitations contained in Section 246(a) of the Act, 8 U.S.C. § 1256(a),[28] would lead to injustice

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[27] Pursuant to 8 C.F.R. § 3.1(d) the Board is empowered to exercise all authority given to the Attorney General by the Act. As a result, the Board can review the record of proceedings and render decisions on issues which were not pressed by the parties before the Immigration Judge.

[28] In pertinent part Section 246(a) of the Act, 8 U.S.C. § 1256(a), provides:

> If, at any time within five years after the status of a

[Footnote continued on following page]

and would be contrary to sound public policy (A. 242-43). Nevertheless, without inquiry into the legislative history surrounding Section 246(a) or mention of the great deference to which contemporaneous interpretations by agencies of statutes they administer are entitled,[29] the Court briefly concluded that the language of the statute was a plain bar to the rescission proceedings instituted against Zaoutis (A. 242). In light of the Ninth Circuit of Appeals' decision in *Singh* v. *Immigration and Naturalization Service, supra*, and the numerous cases construing similar language in prior immigration acts,[30] which reached the opposite conclusion, the problem of interpretation in this action is not nearly so simple. Moreover, the requisite inquiry into the history surrounding the evolution and enactment of the language in Section 246(a) will demonstrate that the District Court's conclusion was in error and should be reversed.

A. Introduction.

In his memorandum supporting his motion for summary judgment in the District Court, Zaoutis asserted that, as a result of the successful rescission proceedings, he now faced "deportation to a land which may have now become alien to him" (A. 106).[31] Accordingly,

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person has been otherwise adjusted . . . it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person. . . .

[29] *Udall* v. *Tallman*, 380 U.S. 1, 16 (1964).

[30] *See* Point I—B, *infra*.

[31] Aside from the misconstruction this statement gives to the effect of Section 246(a), factually it is clear that Zaoutis is not as unfamiliar with Greece (the country to which he could be deported) as he would have this Court believe. His current wife and three children reside there (A. 171) and he apparently has spent much time there since 1967 (A. 30, 171). *See* footnote 9, *supra*.

Zaoutis requested the Court to construe Section 246(a) pursuant to the rules of statutory construction normally associated with deportation statutes namely, that it "must be construed in favor of the alien." *Lennon* v. *Immigration and Naturalization Service*, 527 F.2d 187, 193 (2d Cir. 1975) (deportation pursuant to Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2)); *Bonsztejn* v. *Immigration and Naturalization Service*, 526 F.2d 1290, 1292 (2d Cir. 1975) (deportation pursuant to Section 241(a)(11) of the Act, 8 U.S.C. § 1251(a)(11)); *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948) (deportation pursuant to Section 19(a) of the Immigration Act of 1917, 39 Stat. 889, *as amended*, 54 Stat. 671, 8 U.S.C. § 155(a)). However, Section 246(a) of the Act is not a "deportation statute" and no order of deportation results from proceedings completed under its provisions and 8 C.F.R. § 246. An order of deportation can only be entered by an Immigration Judge after a hearing, conducted pursuant to 8 C.F.R. § 242, at which the alien is entitled to submit applications for relief from deportation based on whatever favorable record or circumstances he has managed to acquire since his entry into this country. See Gordan and Rosenfield, *Immigration Law and Procedure*, Chapter Seven. It is the statutes underlying this order which the courts have rightfully construed in favor of the alien due to the "draconian consequences" which could result from the order's entry.

In contrast, the proceedings instituted by the Attorney General or his designate under the provisions of Section 246(a) of the Act are simply civil proceedings to ascertain whether an alien was entitled to adjustment of status when it was made and, if not, to revoke that status and return the alien to the nonimmigrant status he enjoyed prior to his unlawful adjustment. *Matter of S*, *supra*. As a result, the statutes underlying rescission proceedings, including the statute of limitations contained

in Section 246(a) of the Act, are not subject to the statutory strictures applicable to deportation statutes but must be interpreted in a reasonable manner, consistent with their purpose in the Act and the Governmental interest they embody. Cf. *Independent Coal & Coke Co.* v. *United States*, 274 U.S. 640, 650 (1927); *E. I. Dupont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924); *United States* v. *St. Paul, Minneapolis & Manitoba Railway Co.*, 247 U.S. 310, 314 (1918); *United States* v. *Whited & Wheless, Ltd.*, 246 U.S. 552, 561 (1918). The District Court's decision, as we shall demonstrate, failed to consider either of these aspects or to accord to *Matter of Singh*, *supra*, and *Singh* v. *Immigration and Naturalization Service*, *supra*, the judicial deference these decisions deserved, *Udall* v. *Tallman*, *supra*. Accordingly, it must be reversed.

B. The Board's interpretation of Section 246(a) was supported by the administrative and legislative history of that provision.

Section 246(a) provides:

> "If, at any time within five years . . . it shall appear to the satisfaction of the Attorney General that [a] person was not . . . eligible for . . . adjustment of status, the Attorney General shall rescind the . . . adjustment of status [of] such person."

Before the District Court Zaoutis claimed that the rescission proceeding instituted against him on May 30, 1970 was barred by the five year statute of limitations in Section 246(a) because it was not completed by entry of final order of rescission until May 2, 1974, more than eight years after his status had been adjusted. In support of this contention Zaoutis pointed to the language

in Section 246(a) as interpreted by 8 C.F.R. § 246 and argued that it was impossible for the Attorney General or his designate [32] to have been satisfied that he was ineligible for adjustment of status until after the rescission hearing had been completed and the order of rescission entered by the Immigration Judge. Since, Zaoutis concludes, the order of rescission was not entered until May 2, 1974, its entry was precluded by the five year statute of limitations in Section 246(a).

Zaoutis' conclusion was adopted mechanically by the District Court which refused to examine either the administrative or the legislative history of Section 246(a) and concluded that the "plain meaning" of the section was determinative despite the Ninth Circuit Court of Appeals decision in *Singh* v. *Immigration and Naturalization Service*, *supra* or the anomalous circumstances which resulted (A. 241-43). This was clear error.

The United States Supreme Court and this Court have consistently rejected a "plain meaning" approach to statutory construction where it produces anomalous or absurd results. *Chemehuevi Tribe of Indians, et al.* v. *Federal Power Commission*, 420 U.S. 395, 403-10 (1974); *Federal Maritime Commission* v. *DeSmedt*, 366 F.2d 464, 469-70 (2d Cir. 1966); *Eck* v. *United Arab Airlines*, 360 F.2d 804, 812-14 (2d Cir. 1966). As this Court stated in *Eck*:

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[32] Section 103 of the Act 8 U.S.C. § 1103, authorizes the Attorney General to delegate his responsibilities under the Act. Pursuant to this authority, the Attorney General has delegated some of this authority, including the authority to rescind an alien's status pursuant to Section 246 of the Act, to the Commissioner of Immigration. Under the current regulations the Commissioner has delegated his authority regarding the conduct of adjustment of status rescission proceedings to Special Inquiry Officers, 8 C.F.R. § 103.1(p), or Immigration Judges, 8 C.F.R. § 1.1(e). *Compare, Quintana* v. *Holland, supra.*

> A court faced with this problem of interpretation, or another problem like it, can well begin with an inquiry into the purpose of the provision that requires interpretation. The language of the provision that is to be interpreted is, of course, highly relevant to this inquiry but it should never become a "verbal prison." Sullivan v. Behimer, 363 U.S. 335, 358, 80 S.Ct. 1084 4 L.Ed.2d 1254 (1960) (Franfurter, J., dissenting). Other considerations, such as the court's sense of the conditions that existed when the language of the provision was adopted, its awareness of the mischief the provision was meant to remedy, and the legislative history available to it, are also relevant as the court attempts to discern and articulate the provision's purpose.
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> *Eck* v. *United Arab Airlines*, *supra*, at 812.

Here also a historical inquiry into the administrative and judicial interpretations resulting from the antecedents to the language eventually used by Congress in Section 246(a) of the Act, which existed at the time Congress incorporated this language into Section 246(a), is instructive. Such inquiry demonstrates that, in its use of this language, Congress clearly intended the institution of rescission proceedings to toll the statute of limitations.

As the Ninth Circuit Court of Appeals noted in *Singh* v. *Immigration and Naturalization Service*, *supra*, the legislative history immediately surrounding the enactment of Section 246(a) is "unenlightening". However, the peculiar language used by Congress in the statute of limitations portion of that section has a long history. As a result, any administrative or judicial interpretation of this and similar language would be important to ascertain Congress's intentions in retaining this language

in Section 246(a). *Eck* v. *United Arab Airlines, supra.* Moreover, if these prior interpretations of this or similar language had been consistent and longstanding in 1952 and had been relied upon by previous Congresses to impart a particular meaning to this language, then these interpretations would be a clear manifestation of Congress's intention in Section 246(a). *Commissioner* v. *Noel Estate*, 80 U.S. 678, 681-82 (1964).

The language employed by Congress in Section 246(a) of the Act first appeared in the Act of October 19, 1888 which authorized:

> . . . the Secretary of the Treasury, in case he shall be satisfied that an immigrant has been allowed to land contrary to . . . law, to cause such immigrant within the period of one year after landing or entry, to be taken into custody and returned to the country whence he came . . .[33]

While that statute only concerned deportation, the language it contained, which required the Secretary of the Treasury to be *satisfied* of an alien's unlawful status before any administrative action could be taken against him, and the administrative procedures established pursuant to similar language in later immigration acts,[34] have served not only as a basis for subsequent deportation statutes, but, more importantly, for Section 246(a) of the Act as well. *See* Gordon and Rosenfield, *Immigration Law and Procedure*, Section 1.2(b) (1966).

The Service's interpretation of the language used in the 1888 Act, and subsequent acts containing the same or similar language, has been the type of longstanding

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[33] Act of October 19, 1888, Ch. 1210, 25 Stat. 565, 566.

[34] Act of March 3, 1903, Ch. 1012, § 21, 32 Stat. 1213, 1218; Act of February 20, 1907, Ch. 1134, 521, 34 Stat. 898, 905.

consistent administrative interpretation relied upon by the Supreme Court in *Commissioner* v. *Noel Estate, supra.* For example, in *In re Deportation of Montuori,* Solicitor of Labor Opinion No. 4-7, August 13, 1913, the Secretary of Labor, who was at that time responsible for enforcing immigration statutes, concluded that the statute of limitations did not preclude the deportation of an alien where the warrant of arrest was issued prior to the expiration of the statute but the writ of deportation was not issued until the time limit in the statute had expired. Similar conclusions were also reached in Solicitor of Labor Opinion No. 4-138, March 29, 1916, and Solicitor of Labor Opinion No. 4-7, December 2, 1916.

An examination of the Senate Report [35] accompanying the Immigration Act of 1917,[36] the act which preceded the Act of 1952 [37] in which Section 246(a) first appears, also reveals that the Congress was aware of the problem inherent in the ambiguous language in prior acts but, rather than alter it, preferred to rely on the administrative and judicial decisions construing its provisions. Thus, in describing Section 19 of that act, the statutory precursor to Section 246(a), the report noted at page 12:

> "Its object is to make perfectly clear the intent to continue the practice established when the act of 1907 was passed of expelling from the United States every alien who, after having secured admission in one way or another, was found here within the period of limitation fixed and was found to have been at the time of entry a member of any one of the list of classes enumerated

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[35] Senate Report No. 352, 64th Cong. 1st Sess. (1916). *See* also *United States ex rel David* v. *Tod,* 289 F. 60, 62 (2d Cir. 1923).

[36] Immigration Act of February 5, 1917, Ch. 29, 39 Stat. 874.

[37] Immigration and Nationality Act, Ch. 477, § 246, 66 Stat. 163 (1952), *as amended,* 8 U.S.C. § 1256.

> in Section 2 of the said act, corresponding to Section 3 of this act; and also the intent to continue the practice established under that act, and since approved in a number of court decisions including the decision of the Supreme Court in the Wong You case (223 U.S., 67), of expelling aliens who enter or are found here in violation of the Chinese-exclusion law, *adapting the administrative processes of the immigration act to that class of cases wherever the proceedings are instituted within the period of limitation specified therein.*" (emphasis added).

The consistency of the Immigration Service's response to the question of whether the institution of proceedings tolls the statute of limitations in statutes with language also emanating from the 1888 Act is reflected in the opinions of the circuit courts which, with the exception of the Third Circuit and the District Court in this action, have approved this interpretation unanimously. Thus in this Circuit, after some disagreement, *compare, United States* v. *International Mercantile Marine Co.*, 186 F. 669 (S.D.N.Y. 1911), *rev'd* 192 F. 887 (2d Cir. 1912), this Court has continued to sustain Immigration Service actions which construe the statute of limitations to require only the institution, not the completion, of the proceeding in question. *United States ex rel. Harisiades* v. *Shaughnessy*, 187 F.2d 137 (2d Cir. 1951), *aff'd*, 342 U.S. 580 (1952); *United States ex rel. Ginal* v. *Day*, 22 F.2d 1022 (2d Cir.), *cert. denied*, 276 U.S. 627 (1927); *United States ex rel. Patton* v. *Tod*, 297 F. 385 (2d Cir.), *appeal dismissed* 267 U.S. 607 (1924); *United States ex rel. David* v. *Tod, supra.* As this Court stated in *United States ex rel. Patton* v. *Tod*:

> To construe the statute otherwise would lead to results which we feel confident were never

> contemplated by the Congress when it enacted the act of 1917. One illustration is, perhaps, sufficient. A deportation proceeding might be instituted, as it has been here, within the five years. Resort to the courts might then be had, as in the case at bar, and after the court proceedings had been ended more than five years might have elapsed as in the present case. We cannot believe that the Congress intended, in such circumstances, that the power and authority to deport would cease because the time accorded to the alien in which to have his day in court had run beyond the five years, although the proceeding had been instituted within the five years.
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> *United States ex rel. Patton* v. *Tod, supra,* at 397.

Similar conclusions have been reached by the Courts of Appeals for the First Circuit, *Raftery ex rel. Giacomazzi* v. *Tillinghast*, 63 F.2d 97 (1st Cir. 1933); *Tillinghast* v. *Cresswell, ex rel. Di Pierro*, 54 F.2d 459 (1st Cir), *cert. denied*, 286 U.S. 560 (1931); *Nocchi* v. *Johnson*, 6 F.2d 1 (1st Cir. 1925), the Fifth Circuit, *Miller* v. *United States ex rel. Hunt*, 181 F.2d 363 (5th Cir. 1950); *United States ex rel. Calamia* v. *Redfern*, 180 F. 506 (E.D. La. 1910), and the Ninth Circuit, *Singh* v. *Immigration and Naturalization Service, supra; Marty* v. *Nagle*, 44 R.2d 965 (9th Cir), *appeal dismissed*, 283 U.S. 868 (1930); *Metaxis* v. *Weedin*, 44 F.2d 539 (2d Cir. 1930); *Bun Chew* v. *Connell*, 233 F. 220 (9th Cir. 1916). Only the Third Circuit and the District Court in this action have adhered to the "plain meaning" of the statute without inquiring into either the administrative interpretation of its language or Congress' intent in its enactment. *Quintana* v. *Holland*, 255 F.2d 161 (3d Cir. 1958); *McCardless* v. *United States ex rel. Swystun*, 33 F.2d 882 (3d Cir. 1929); *Hughes* v. *Tropello*, 296 F. 306 (3d Cir. 1924).

By concluding that the "plain meaning" of the language in Section 246(a) required the completion of Zaoutis' rescission proceeding within five years, the District Court enlocked itself in the type of "verbal prison" that this Court cautioned against in *De Smedt* and *Eck*. As a result the District Court refused to consider the highly pertinent administrative and judicial interpretations of that language which concluded that the institution of proceedings against an alien tolled its provisions. As we have discussed these interpretations of this language were referred to and relied on by Congress in its repeated use of similar language in subsequent legislation and thus were deemed to have the effect of law. *Commissioner* v. *Noel's Estate, supra.* More importantly in relying on the same language used in the 1888 Act to structure Section 246(a), the Congress implicitly approved the long-standing administrative practice again and clearly intended it to continue. In this context, the District Court's attempt to ascribe a contemporary meaning to the language in Section 246(a), without resort to any of the conditions which existed when it was adopted or to its legislative, administrative or judicial history, is clearly error which must be reversed.

The Board of Immigration appeals decision in this case, which concluded that the statute of limitations in Section 246(a) is tolled by the institution of rescission proceedings, is consistent with prior administrative interpretations of that language as well as prior administrative and judicial interpretations of similar language in previous immigration acts. *Commissioner* v. *Noel Estate, supra.* However, equally importantly, the Board's decision represented the interpretation applied to a statute by the agency charged with the statute's enforcement and the result was consistent with the agency's interpretation of the statute since the language it contains

first appeared. Under these circumstances the Board's interpretation was entitled to great deference by the District Court. As the United States Supreme Court stated in *Udall* v. *Tallman*, *supra*, at 16:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153. See also, *e.g.*, *Gray* v. *Powell*, 314 U.S. 402; *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583. 'Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' *power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408. See also *Nazareno* v. *Attorney General of the United States*, 512 F.2d 936, 939-40 (D.C. Cir. 1975).

The Board's decision was reasonable, supported by legislative and administrative history and entitled to great deference. The District Court's decision failed to recognize any of these legal principles and instead relied upon a rule of statutory construction which "has long ceased to have this Court's adherence." *Federal Maritime Commission* v. *DeSmedt*, *supra* at 469. Consequently, the District Court's decision should be reversed and the Board's decision reinstated by this Court.

C. The public policy behind statutes of limitations also supports the reasonableness of the Board's decision.

The decision of the Board in this action is also consistent with the functional operation of a statute of limitations. As the United States Supreme Court stated in *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 428 (1964):

> Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-349. Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.

See also *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 554 (1974).

All of the practical policies behind a statute of limitations are promoted by the Board's conclusion that the statute of limitation in Section 246(a) is tolled by the commencement of rescission proceedings. Once the notice of intent to rescind has been issued by the district director, there can be no further surprise concerning the Service's intentions. Similarly, the notice alerts the respondent to locate the witnesses and to preserve the docu-

ments he may need to defend himself. Finally, by construing Section 246(a) to permit the tolling of the statute of limitations, this Court will not only bring this archaic language into line with ordinary criminal and civil statutes of limitations, which provide that the filing of an indictment or of a civil complaint toll their running, *see, Singh* v. *Immigration and Naturalization Service, supra,* at 1096, but it will also insulate the respondent from arbitrary action designed to rush such proceedings along to beat the expiration of the statute of limitations. In this context the District Court's conclusion, that the Attorney General could only have been satisfied under Section 246(a) when he issued the order of rescission through the immigration judge, leaves no standard applicable to the *issuance* of a notice of intention to rescind. However, the Board's interpretation clearly says that the district director must be satisfied of his actions, as he was in this case, before commencing rescission proceedings against an alien. In the long run such an interpretation is clearly preferable.

A comparison of the possible prejudice resulting to both the alien and the Government from the District Court's decision also illustrates the reasonableness of the Board's interpretation of Section 246(a). At the conclusion of his rescission proceeding, after a full hearing with the opportunity to present evidence in his behalf (although he chose not to do so (A.78)), Zaoutis was unable to demonstrate any prejudice from the Board's interpretation of Section 246(a) in this action (A. 87). Similarly, in the event deportation proceedings are commenced against him, Zaoutis will be given another hearing at which he can not only defend against the charges but submit applications for discretionary relief (*see* Point I-A, *supra*).

In contrast, adoption of the District Court's "plain meaning" interpretation of Section 246(a) severely prej-

udices the Government. Not only does it stand as an absolute bar to the Government's legitimate interests in the enforcement of its immigration laws against Zaoutis and other aliens who perpetrate frauds, cf., *United States* v. *Tateo*, 377 U.S. 463, 466 (1964), but it also will require the Service to rush investigations of aliens similarly situated which could severely jeopardize collateral criminal and disciplinary proceedings pending against the third party organizers of these frauds.[38] In addition, as the Ninth Circuit recognized in *Singh* v. *Immigration and Naturalization Service*, *supra*, at 1095-96, the district director no longer has the control over the pace of the proceeding he once had when Section 246(a) was enacted. *Compare*, *Quintana* v. *Holland*, *supra*. As a result, adoption by this Court of the District Court's conclusion will put a premium on the use by the respondent of any and all means of delay and will inevitably lead not only to a loss of due process at the hearing itself, *see Singh* v. *Immigration and Naturalization Service*, *supra*, but also to a substantial increase in the Courts' caseload as both aliens and the Service seek their aid to determine whether the pace of the proceeding was proper. Surely such a result is not to be encouraged.

Finally, the adoption in this Circuit of the Board's reasonable interpretation of Section 246(a) will promote due process and justice in future rescission proceedings. The Immigration Judge, the independent arbiter in these proceedings, will be able to control the pace of proceeding without reference to the statute of limitations but with due concern for the rights of the respondent as well as the Government in the hearing. Thus, the Immigration Judge could order the proceeding accelerated if he felt the government was delaying while its staff searched for evidence or the delay was prejudicing the respondent.

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[38] *See*, footnote 10, *supra*.

Similarly he could adjourn the hearings if he felt its continuance would unduly hinder the respondent's ability to answer the allegations made by the Government. If the District Court's conclusion is adopted, however, the Immigration Judge's ability to control his docket would be lost. Under pressure to the statute of limitations the judge would be tempted to accelerate the proceeding solely to complete it before the deadline. This would hinder both sides' ability to present evidence at the hearing. As the Court stated in *Singh* v. *Immigration and Naturalization Service, supra,* at 1096:

> We believe, in short, that permitting service of a notice of intent to rescind to toll § 246(a) would serve the interests of aliens whose adjustments of status are challenged better than would the construction championed by Singh. The former construction promotes fair and impartial decisions reached after expeditious, but not hasty, adjudication. It should protect aliens from rushed proceedings conducted with an eye on the calendar; it should not, under the present regulations, promote the premature institution of rescission proceedings without substantial evidence.

The District Court's decision, as it admits (A. 242-43), does not foster any of these considerations. Nor, as we have demonstrated, is it supported by the administrative and judicial history surrounding the language in Section 246(a). Accordingly, it should be reversed.

POINT II

Zaoutis' Conduct Throughout The Rescission Proceeding Precludes Him From Asserting The Statute Of Limitations.

"It is, as Justice Cardozo stated long ago, a 'fundamental and unquestioned' principle of our jurisprudence that 'no one shall be permitted to . . . take advantage of his own wrong.' *R. H. Stearns Co.* v *United States*, 291 U.S. 54, 61-62 (1934)." *Corniel-Rodriguez* v. *Immigration and Naturalization Service*, 532 F.2d 301, 302 (2d Cir. 1976). This principle has been applied to preclude the Government from asserting its conceded statutory right to deport an alien where it failed to inform the alien of the immigration consequences of her actions. *Corniel-Rodriguez* v. *Immigration and Naturalization Service, supra.* In fact, this principle is so firm it has precluded a criminal defendant from asserting his constitutional right [39] to a speedy trial where he has refused to demand one, *United States* v. *Lustman*, 258 F.2d 475 (2d Cir.), *cert. denied*, 358 U.S. 880 (1953); *United States* v. *Schwartz*, 53 F.R.D. 208 (S.D.N.Y. 1971), or has acquiesced in the delay, *United States* v. *Dallago*, 311 F. Supp. 227 (1970). Most importantly, the application of this principle does not extinguish the asserted right. It presupposes the existence of the right but denies it judicial enforcement because circumstances make that enforcement inequitable. *United States* v. *Chatham*, 298 F.2d 499, 501 (4th Cir. 1962).

Assuming *arguendo* that this Court rejects theBoard's reasonable interpretation of Section 246(a) and adopts

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[39] United States Constitution, Amendment VI.

the "plain meaning" interpretation used by the District Court, nevertheless, on the facts of this case, it would be manifestly inequitable for it to allow Zaoutis to assert the statute of limitations in this action. The facts clearly reveal that on May 20, 1970, when the Service was satisfied that Zaoutis had been ineligible for adjustment of status in 1965 and issued the notice of intention to rescind that status, the Service was fully prepared to proceed immediately with the hearing. At this time it had secured the full cooperation of Angelo Collazo (A. 143) and had obtained a commitment from Fredeswinda Comacho to testify against Zaoutis (A. 166). In light of the statute of limitations problem, of which the Service was fully aware (A. 156), there simply was no reason for it not to proceed expeditiously. Yet a three year delay ensued before the Immigration Judge entered his order rescinding Zaoutis' adjustment of status. To what were these delays attributable? Zaoutis claimed before the District Court that they were solely the fault of the Service (A. 13-4). The record reveals just the opposite.

After the notice of intention to rescind was issued on May 20, 1970, Zaoutis' attorney responded by requesting a hearing and asking that it not be held from June 29, 1970 until July 27, 1970 because he would be out of the country (A. 33). Thereafter the Service agreed to postpone the commencement of Zaoutis' hearing still further to allow him to cooperate with the Discipline Committee of the Bar Association enabling him to acquire favorable equities in his immigration record to counterbalance the fraud in his marriage (A. 38).[40] At no time during this period before his rescission hearing commenced did Zaoutis or his attorney ever com-

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[40] *See* footnote 17, *supra*.

plain that Zaoutis was being prejudiced by this delay so the Service acceded to his requests.

This pattern of delay at Zaoutis' behest continued throughout the rescission hearing. At first Zaoutis refused to participate until his motion to dismiss based on the statute of limitations was decided (A. 41). When his motion to dismiss was decided Zaoutis requested additional hearing time so he could present his case in one hearing (A. 75). Then, after an adjournment at his request (A. 171), the hearing was reconvened at which time Zaoutis announced that he had "nothing further to present" (A. 78). Again, throughout these substantial delays neither Zaoutis or his attorney ever requested the Judge to expedite the hearings.

Against this background of delay, we submit it is manifestly inequitable to permit Zaoutis to assert the statute of limitations as a complete bar to rescission proceedings where the delay clearly resulted at his request and for his benefit and was premised on the Service's good faith belief that the institution of the proceedings tolled the statute of limitations. In similar circumstances the courts have not been hesitant to preclude criminal defendants from asserting constitutional rights where the violations of those rights have occurred solely as a result of their actions. *United States* v. *Dallago*, *supra*. Since immigration proceedings are civil administrative proceedings at which the constitutional protections assured criminal defendants do not even apply. *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276, 285 (1966), this Court should not hesitate, based on the record before it, to preclude Zaoutis from asserting the statute of limitations to challenge the validity of the rescission order entered against him. *Corniel-Rodiguez* v. *Immigration and Naturalization Service*, *supra*.

CONCLUSION

The District Court decision should be reversed.

Dated: New York, New York
February 2, 1977

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
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AFFIDAVIT OF MAILING

CA 76-6182

State of New York)
County of New York) ss

Robert S. Groban, Jr. being duly sworn, deposes and says that he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

4th day of February 1977 he served a/ two copy s of the within Brief of Defts-Appellants

by placing the same in a properly postpaid franked envelope addressed:

Daniel Riesel, Esquire
Winer, Neuberger & Sive
425 Park Avenue
New York, New York 10022

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Robert S. Groban, Jr.

Sworn to before me this

4th day of February, 1977

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978